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# How the Law of Agency Affects Business

## Modern American Law Lecture

Blackstone Institute, Chicago

# HOW THE LAW OF AGENCY AFFECTS BUSINESS

BY

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Judge Superior Court, Indiana.

*One of a Series of Lectures Especially Prepared for the Blackstone Institute*

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T. J. MOLL

## THEOPHILUS J. MOLL

Judge Theophilus J. Moll, the author of this Lecture, was born at Evansville, Indiana, in 1872. Having completed the high school course with honors, he attended DePauw University, from which he received his bachelor's degrees in philosophy and law. He was appointed clerk of the Superior Court at Evansville, and after serving two years was awarded a scholarship at Cornell University and received his master's degree in law. He was given a scholarship at Columbia University, which he resigned to take up the practice of law in Indiana, having been admitted in 1894.

In 1901 he was engaged as instructor in the Indianapolis College of Law, became its dean in 1905, and resigned in 1909 to found the American Central Law School, of which he continued as dean until its merger into the Benjamin Harrison Law School at Indianapolis, of which he was dean until 1919. He was elected Judge of the Superior Court at Indianapolis in 1914.

He wrote the article on "Receivers" in Modern American Law, has written several of the lectures in this series, is the author of a text on Independent Contractors, has contributed to the Standard Encyclopedia of Procedure, American Leading Cases, Dunham's Law of Insurance, Elliott on Contracts and the fourth edition of Elliott on Corporations. He is a member of the Indiana State and Indianapolis Bar Associations.

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# HOW THE LAW OF AGENCY AFFECTS BUSINESS

*By*

T. J. Moll, Ph.B., LL.M.

## I.

### INTRODUCTION.

One of the most common and important features of everyday life and activity today is the relation of principal and agent. Consciously and unconsciously, voluntarily and involuntarily, business affairs of both large and small magnitude are being conducted by representatives of those interested, as often as, if indeed not oftener than, by the parties themselves.

In this Lecture, a number of cases have been referred to which illustrate the propositions of law involved. Consideration of these cases will show how frequently business transactions are controlled by the rules of Agency. Vitally connected with practically every one of these transactions, are questions regarding the mutual relations springing up and existing between the parties. These situations involve the rights the principal acquires as to the third persons and conversely the rights of the third persons against the principal. Of corresponding interest, are the interrelations between the agent and third persons, and the principal and agent.

Assuming that the relation of agency exists, whether by appointment, ratification, estoppel or by

necessity, let us see what results follow the creation of the relation or of any transaction connected with the relation. We then need to consider how properly to carry out the purposes of the relation, what the effects of a valid exercise of the relation are, and what may result from a nonfeasance, misfeasance or malfeasance of the agency status.

## II.

### RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS

As the primary purpose of agency is to bring the principal into contractual relations with the third party through representation by the agent, it follows that the most important division of our topic is that referring to the relations between the principal and third persons. We soon come to realize that substantially every transaction carries with it reciprocal rights and obligations. This is true particularly if the contract is wholly executory, for there both parties have mutually made promises each to the other to be carried out subsequent to their making.

#### Dealing With Agent Perilous.

A third person is commonly said to deal with an agent "at his peril". By this is meant that when a third person contracts with another through the other's agent, he takes the chances of making a binding contract, that is, one which will be enforced. It is up to the third person to see that his own interests are safeguarded by first establishing that the agent is acting within the scope of the authority granted.

Now the scope of authority may be either actual or apparent. The third person has a right to contract within the apparent scope of the agent's authority, provided such third person does not already know the actual scope of authority.

*Constructive Notice.* Generally speaking, every one is presumed to know the law. Therefore as public officers have only such authority as is given them by statute, persons dealing with them as public agents are bound to know the limitations of their authority. As said by the United States Supreme Court, "It is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule, which, through improper combinations or collusion, might be turned to the detriment and injury of the public."

So also, every one is presumed to have constructive notice of instruments properly recorded in public records. Hence if one is acting under a formal power of attorney, duly recorded, the third person dealing with him is deemed to know positively the extent of the power of such attorney in fact. It accordingly follows that third persons dealing with these two classes of agents are protected in their transactions only so far as such agents have actual authority.

*Actual Authority as by Power of Attorney.* The following is a common form of a Power of Attorney which may be used in most states, but of course should be changed to suit the agency in each case.

"KNOW ALL MEN BY THESE PRESENTS, That I, William Merrill, of Indianapolis, Marion

County, Indiana, do hereby appoint Albert Daniels, of Chicago, Cook County, Illinois, my attorney, in said city of Chicago, for me and in my name, to demand, sue for and receive all debts or other personal property to which I am now or may hereafter become entitled, or which are now or may become due and payable to me, and in my name and as my act and deed to sign, seal, acknowledge and deliver general warranty deeds of any and all real estate which I now or may hereafter own in said city of Chicago, and to make, draw, sign, accept or endorse in my name any negotiable paper in which I may be interested or which may be necessary in the transaction of my business connected with said real estate; to manage all of the said real estate in said city of Chicago and to make a delivery of such leases and agreements as shall be necessary, and receive and collect all rents which may be due and payable to me from said real estate, and generally to act as my attorney and agent in said city of Chicago aforesaid in relation to the premises; and all other matters in which I may be interested or concerned and on my behalf to execute all such instruments and to do all such things as fully in all respects as I myself could do if personally present; and I hereby for myself, my heirs, executors and administrators ratify and confirm whatsoever my said attorney shall do by virtue hereof, hereby giving him full power to substitute and appoint from time to time another person in his stead with the same powers as herein granted him, hereby confirming and ratifying all such appointments.

In witness whereof, I have hereunto set my hand and seal at Indianapolis, Marion County, Indiana, this 1st day of July, A. D. 1914.

*WILLIAM MERRILL.*

STATE OF INDIANA, }
COUNTY OF MARION. } ss

Before me the undersigned a Notary Public in and for said County and State this 1st day of July, A. D. 1914, personally appeared the above named William Merrill and acknowledged the execution of the foregoing power of attorney for the uses and purposes therein set forth.

Witness my hand and Notarial Seal at Indianapolis, Indiana, this 1st day of July, A. D. 1914.

My Commission Expires July 6th, 1915.

*CHARLES LOGAN,* Notary Public."

Whenever any agent acts within the scope of his actual authority, the result is a contract binding alike on both his principal and the third person, provided such contract (had it been made by the principal acting in person) would have been binding. This is the very essence of the agency relation.

**Scope of Apparent Authority.**

While it is true that a third person deals with an agent at his peril, still such third person does not take all the risk. If the agency relation exists and the third person is not apprised, actually or constructively, of the limits of the agent's actual authority, such third person is protected, provided the agent acted within the apparent scope of his author-

ity. When agents are the means of transacting business, the public is entitled to deal with them in a reasonable and prudent manner, without being obliged to take the chance in the end that the agent exceeded his authority.

This is true even where the agent, acting within his apparent authority, violates positive rules of his principal so long as the third person is not aware of such secret limitations. Under such circumstances the usual doctrine applies and governs that where one of two innocent persons must suffer he must bear the loss who made it possible. Clearly it is the principal who has made the loss possible by having a perverse, incompetent or faithless agent.

*Powers Included.* Included within the apparent scope of the agent's authority in addition to the powers actually conferred, are certain incidental powers. A sales-agent ordinarily may warrant his principal's title. By commercial custom, a bank cashier may borrow money on his bank's credit. Other powers may properly be inferred from the principal's own conduct, although in reality these may as well be considered as powers actually conferred.

A person who buys goods from an agent and receives possession is ordinarily justified in paying the agent for them, but such agent is not ordinarily authorized to accept anything but money in payment. However, usage may change this; and whether he may sell on credit depends largely on circumstances. Generally, an agent who buys cannot pledge his principal's credit.

The powers of the general manager of a business

are presumptively commensurate with the demands of the business, and will include whatever is ordinarily incidental thereto. An agent having possession of securities is presumed to have authority to make collection thereof, but not where he does not have possession, even though he negotiated their purchase. When the transaction involves the agent's making or endorsing commercial paper, the third person should be unusually circumspect, as the presumption is very strong against the agent's having the required authority.

*Effect Where Agent Exceeds Authority.* Of course if the agent has no actual authority, or having such actual authority, acts beyond the scope of his authority (real or apparent as the case may be) contracts made by him are ineffectual unless the principal sees fit to ratify them. The third person can avail himself of a contract only when the agent acts within his authority. Hence the third person cannot complain if the contract in question is ineffectual because in excess of the agent's power. The third person has no right or power to increase the authority of the agent. This right is reserved to a voluntary principal, or if an agency by necessity to the law itself. And in this connection, it should be emphasized that the scope of authority is not determined by what the agent declares his authority to be but what the principal or the law, or both, determine it to be.

The apparent scope of authority, for example, of commission merchants (technically known as factors) is largely a matter of custom. Buyers of goods are also generally protected by statutes when dealing

with such agents in the usual course of business. The factor has power to sell the goods virtually as he pleases, to warrant their quality or his principal's title, or even to pledge the goods to protect a draft. But he must not barter, or sell except for cash or (by some authorities) for good bankable paper. While the field of the broker's activity is more extensive than that of commission men, the scope of his authority is more limited. Generally he has no power to warrant so as to bind his principal. He may sell on credit only when usage permits. Not having possession of the goods, etc., sold, he does not ordinarily have authority to collect. But brokers selling stock may, of course, collect where they deliver the stock.

Inherently a bank cashier has authority to execute all kinds of commercial paper incident and necessary to the bank's business. He may borrow money on the bank's credit and collect its debts, and he may certify its customers' checks.

### Undisclosed Principal.

It often happens that a third person deals with an agent not knowing or suspecting that he is an agent but believing him to be a principal. When the fact of the agency is not known by the third party, the principal is an undisclosed one. After a great deal of discussion it has been finally settled that a third person acquires practically the same rights against an undisclosed principal as against any other. But as the fact of the agency is undisclosed, there can be no apparent authority as agent, as distinguished from actual authority. The principal is

bound only to the extent of his agent's vested power. The undisclosed principal cannot even ratify his agent's unauthorized act so as to avail himself of it, or bind himself by it.

While the relation of agency exists, the agent can bind his principal by any act done within the scope of his authority, and by any admission made contemporaneous with and explanatory thereof. But these powers terminate when the relation ceases. For instance, goods were sold to defendant through his agent. The correctness of the accounts could not be established by producing statements thereof whereon was written by the agent after he quit his job: "This statement is correct. J. B. M. Clerk". An agent is a competent witness to prove the agency, but statements by him out of court to this effect are incompetent. Thus the payee of a note or draft, is not allowed to prove that the defendant's husband told the payee that he was his wife's agent. In other words, parol evidence is not admissible to discharge the agent.

*Ostensible Authority.* The third person may hold the principal to every representation made by his agent within the scope of such authority as the principal leads the third person reasonably to believe the agent is authorized to make. If an agent innocently misrepresents a material fact, the third person may rescind the contract. If such misrepresentation is knowingly or recklessly made it constitutes fraud and the third person may not only repudiate the contract, but may recover damages in tort.

Liability is not confined to fraud. Where a New

York department store advertised a dental department, it was held answerable to a patron for the dentist's malpractice even though in fact the dentist was conducting an independent business. And such negligence, though done in performing an unauthorized act, may be ratified. A coal driver without authority filled a coal order and in so doing broke a plate glass window. When the dealer tried to collect for the coal, he was held liable for the window.

A Pennsylvania court has recently held that a man cannot reap the benefit of his agent's fraud without at the same time subjecting himself to the burdens of such fraud. This applies whenever the agent acts within the scope of his authority, even though not for the principal's benefit. The weight of authority is to the effect that if a stock transfer agent fraudulently issues stock certificates in excess of the amount which the corporation may lawfully issue and by collusion with the transferee of such excess stock, sells them to innocent purchasers for value for his own benefit, the company is liable to such innocent purchaser. So also, where an agent who is authorized to issue bills of lading for freight received by a carrier for shipment, issues fictitious bills of lading (that is for freight nominally but not actually received) and issues them in the name of a confederate by and through whom they are transferred to innocent purchasers, the carrier (usually a railroad or express company) is liable to such third person who thus indirectly deals with the agent.

An interesting case arose in Minnesota. D. residing at a distance was M.'s purchasing agent; M.

habitually sent D. money to make such purchases, on receipt of telegraphic instructions from D. The telegraph company's operator forged a message from D. which was delivered to M. on the strength of which M. forwarded through the local express company (represented by the same operator) the sum of $1,500. The operator intercepted the package on its arrival and appropriated the money. These facts were held sufficient to establish the telegraph company's liability. The express company was not sued, but the court intimated it too would have been liable.

*Where Acts of Undisclosed Principal Have Been Ratified.* Whenever an agent for a disclosed principal acts within the scope of his authority, or having acted beyond or without authority has his act ratified by his principal, the third person is entitled to look to the principal alone on the contract. Otherwise, as we have already seen, the third person may look to the principal, or (as we shall presently see) he may elect to hold the agent. But in certain other cases of disclosed principals, the third person may resort to either the principal or the agent. If the agent contracts personally in a simple contract (that is, one not under seal, or negotiable under the law merchant) he is personally liable, as is also his principal, at the option of the third person.

In a leading English case, an agent signed a contract for the sale of certain iron, though known to be acting for an iron company, and he was held liable as well as his employer would have been if sued. In a New York case an agent entered into a contract under seal in his own name, though really on behalf

of his principal. When his principal was sued, the latter was held not answerable. The contract was under seal and the rule of the common law is that only those who are parties to a sealed instrument can sue or be sued upon it. Had the contract been a "simple contract" (that is, unsealed) the principal might have been held liable.

Ordinarily the death of the principal terminates the agency. The fact of such death is not always immediately known to the agent and third person. If under such circumstances, the agent assumes to contract on behalf of his principal, no contract is really made and the principal's estate is not bound. This principle was carried to an extreme length in a case in the Federal Supreme Court holding that payments made to an agent after the principal's death did not release the debtor.

Clearly a contract entered into between a third person and an agent acting as such within his actual or apparent authority is, if binding on the principal, likewise binding on the third person. The same is true where an unauthorized contract is duly ratified. While an undisclosed principal cannot ratify an unauthorized contract so as to hold the third person, such third person may ordinarily be bound by any contract on behalf of an undisclosed principal when the agent is acting within his actual authority. On principles of equity, a principal may recover back money which an agent has paid to a third person under a mistake of fact or similar circumstances, or which the third person has obtained from the agent by duress or fraud or by unjust exactions.

**Extent of Agent's Implied Authority.**

As previously observed, a third person deals with an agent at his peril. When an agent disposes of his principal's property or funds beyond the scope of his authority, the third person has to restore the same to the principal or account therefor. Where a sales agent turns over goods sent him to sell, in payment of a debt owing by him to the transferee, the latter is liable to the principal as the agent has no authority to dispose of the goods in this way

An agent does not have general authority to endorse and collect negotiable paper payable to his principal and in the absence of such authority the bank on which the check is drawn has to answer a second time to the principal named as payee. Circumstances and custom may of course modify this rule. For example, an attorney holds a claim for collection on a commission basis. When the debtor delivers to the attorney a check payable to the client's order, the attorney, having an interest in the proceeds, is authorized to endorse and collect the check. Of course if the commercial paper is payable to the principal or bearer the bank is justified in any case in paying on presentation by the agent just as it would when presented by any bearer. The same is true when the paper is endorsed in blank, and delivered to the agent, though actually the property of the principal.

Moreover, the principal may by his own conduct preclude himself from asserting rights against the third person. In an interesting New Hampshire case, an agent employed to buy a horse, took a bill of sale in his own name, which he exhibited to his prin-

cipal who allowed him to retain both the horse and the bill of sale. The agent showed the bill of sale to a third person who did not know of the agency and sold him the horse. The third person was properly held not accountable to the principal even though the agent embezzled the proceeds. In another case, an ordinance provided that public vehicle licenses should be taken out in the owner's name. A dray owner allowed his brother to secure such license in his own name. An innocent purchaser from such brother, having investigated the records was protected in his purchase.

Several states have enacted statutes known as "Factors Acts." These protect innocent purchasers buying from commission merchants who have dealt with the principals' goods in excess of their authority. The common law, however, does not make any such distinction.

**Liability in Tort of Third Person to Principal.**

Not only in contract but in tort as well, may a third party be liable to the principal. This is especially true where there is collusive fraud between the third person and the agent. Where a coal merchant offered to sell the purchasing agent of a municipal corporation coal at a price which would net the agent a profit to himself, the commission was declared by the court to constitute a fraud. It was held that the excess price was a damage to the city and that the amount could be recovered from the merchant, although as indicated the merchant himself did not get the excess.

Where a third person knowing that an agent is about to commit a fraud on his principal, becomes a party to the fraud by contracting with such knowledge, the principal may avoid the contract. A lot owner, in ignorance of the fact that another had improved his lot by mistake thereby enhancing its value, authorized the agent to sell it for about one-third its value. The agent knowing of such improvement sold it to a third person who also knew of it, both of them knowing the owner was unaware of the true facts. The sale was set aside even though a price somewhat in advance of that fixed by the owner was paid.

Moreover the third person is liable to the principal for any unlawful interference with the agency; as, by unlawfully injuring the agent or interfering with his performance of his duties, or for unlawfully inducing the agent to breach his contract of employment. A leading case is one wherein an actor or singer was engaged by the plaintiff to perform at his theater. When the defendant, a rival theater owner, prevailed on the employe to breach his engagement (knowing of the prior contract) the defendant was held answerable in damages. While it is true that the actor was not an agent in any sense, still the underlying principle is the same. The law holds one liable for any illegal interference with a contract of service.

*Third Person's Knowledge of Agent's Fraud.* Where an agent wrongfully appropriates his principal's money or property and the same comes into the hands of a third person who is aware of the wrong or being unaware of it receives the property without

proper consideration, the recipient must respond to the principal. In an Indiana case, a trusted employe embezzled several thousand dollars belonging to the corporation employing him. This he invested in real estate but he put the title in his wife's name. The corporation sued the wife to secure the property and it was held that she was in legal effect a trustee for the company whose funds her husband had misappropriated.

## III.

### RELATIONS BETWEEN THE AGENT AND THIRD PERSONS.

Next in importance are the questions as to the reciprocal rights of the agent and third party against each other. As we have seen, when the agent carries out the evident purpose of the agency, by acting within his authority and entering into a contract in his principal's name, he is not involved in the transaction as a party to the contract and his principal alone is liable. But if the agent acts beyond his authority or not in the principal's name, a different situation exists.

#### Liability of Agent for Unauthorized Acts.

If an agent assumes to act without, or beyond his apparent, authority (whether he does so, intentionally, carelessly or erroneously) he alone is liable to a third person injuriously affected thereby. Thus where an agent for a fire insurance company, represented to a policy holder that when petroleum was kept by the single barrel at a time it was unnecessary to mention such fact in the policy or to get the com-

pany's consent, and it appeared that he had no authority to make such statement, a holder who in reliance on the agent's statement, forebore to secure an exception, was barred from recovery against the company. As well expressed in the opinion: "If the agent has no such authority and acts bona fide, still he does a wrong to the other party, and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertions should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it."

*Necessity of Existence of Principal Capable of Acting.* In order to make the agent liable in such a case, however, the unauthorized contract must be one which the law would enforce against the principal if it had been authorized by him. An auctioneer, without disclosing his principal, sold corporate stock to the plaintiffs at a price lower than he was authorized to sell. His principal refused to carry out the contract. Thereupon the plaintiff sued the auctioneer, who set up that the contract of sale not being in writing was unenforceable. On appeal, four judges of the New York Court of Appeals, held the auctioneer not liable, and three held to the contrary. If the agent intentionally misstates his authority, he is (if liable at all) answerable in tort for deceit.

The same rules apply apparently, where there is a misstatement actual or implied, as to the competency of the principal, as where an agent acts for an infant

who (under the common law at least) could not have an agent and certainly not one by appointment under a power of attorney.

Where promoters of a proposed corporation enter into contracts on its behalf before it is incorporated, no corporate contract is formed for the simple reason that there is no principal in existence legally capable of contracting. Moreover, such corporation when it comes into existence cannot legally ratify such contract, in a technical sense. The only effective way is for the corporation when it is finally organized, to make a contract along the same lines with the persons who had the so-called contract with the promoters. This should be done by adopting a resolution authorizing the contract at a meeting of the stockholders or directors (whichever has the power in the given case) and then formally entering into the contract between the new corporation and the third person.

*Special Instances of Agent's Liability.* Where exclusive credit is given to one known to be acting as an agent, and it is intended by both parties to a given contract that no resort shall be had by or against the principal, and also where the skill, solvency or any personal quality of the agent is a material ingredient in the contract, the agent is accountable to the third person for the fulfilment of the contract. Where a person makes a contract of sale of real estate in his own name as owner, he cannot discharge his contract by tendering a deed of another person, even though such other person is the real owner. Where an agent is given cash to make a purchase, but instead pays

only part cash and gives his own check for the balance, the seller must look to the agent alone for such balance and not to the principal, if the check is dishonored.

By a technical rule of the common law, the vendor in a sealed instrument, executory as between the parties, for the sale of land, cannot enforce it as the simple contract of another not mentioned in or a party to it. This is true even though the vendor prove that the vendee named in and signing and sealing the contract, had oral authority from such other to make the contract and to act as the other's agent in the transaction. Nor can the vendor, under such circumstances, recover the balance of the purchase price from such alleged principal. There have been a great many refinements in construing such contracts. To a great extent the difficulties have been obviated by statutes enacting that contracts merely to sell as distinct from deeds and mortgages need not be under seal, but simply in writing. The same result is reached in some states, where statutes do not specifically require the contract to be under seal.

**Liability of Agents as to Negotiable Instruments.**

By a general rule of the law merchant, persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent. Negotiable instruments bind only the ostensible maker, though the word "agent" follows his signature, where no prin-

cipal is named in the body of the instrument, or indicated by the signature.

The holder is not bound to search for a principal unknown to the instrument itself. Conversely, the holder's rights are confined to the parties to the instrument and he must rely upon them alone. But he may establish that the name used as the signature to the instrument has been adopted by the assumed principal or by the person not named in the instrument as his own in transacting the business. These doctrines were laid down in a New York case in which one Love was sued on a note signed "J. W. Johnson, Agent." A judgment for Love was affirmed.

*Ambiguities on Face of Instrument.* As just indicated, the face of the negotiable instrument may disclose an ambiguity or doubt as to who is the real maker and in such cases parol evidence is sometimes admitted to remove or explain the ambiguity. The instrument may clearly show on its face that it is the obligation of the principal alone or of the agent alone, but in between there are numerous cases of doubt and ambiguity. In solving these, various courts have reached different results and the whole subject is hence one of confusion.

Assuming that Porter is really the principal and Adams is his agent, the following signatures to negotiable paper have been held to be that of the principal only: John Porter; Porter by agent Adams, or by Adams, agent, or by Adams; Adams, agent for Porter; Adams for Porter; for Porter, Adams. Likewise the following have been construed to be the signature of the agent only: Adams; Adams, agent, as

in the Love case cited; Adams, agent of Porter; Adams, President or Treasurer of Porter Company; Adams trustee. A note reading: "For value received, we promise to pay, etc. Signed, Harriman, Trevett, (and others) President, Directors of P. & S. Co." was held to present no ambiguity and to be the promise of the persons named alone without anything to indicate that it was for or on behalf of another.

But suppose the note had been signed "P. & S. Co., Harriman, President." The courts hold three different ways on this: some that it is the company's signature alone; others that it is the signature of both the company and the president personally; and still others that its ambiguity is such as to permit a parol explanation. In Indiana, affixing the corporate seal has been declared to be equivalent to the corporation's written signature.

*Ambiguities in the Body of the Instrument.* Recitals in the body of the instrument sometimes create ambiguities and at other times serve to remove ambiguities. Thus, a note reciting "We, the subscribers, jointly and severally promise to pay X, or order, for the B. Co., $3,500, etc. (signed) Hunnewell, Gore, Kupper," was considered the personal obligation of the signers and not of the B. Co. which was sued. On the other hand, a note reciting "On June 1, 1898, the Western, etc., Society agrees to pay to the order of J., $5,592, etc., (signed) B. F., Gen'l Supt." was held to be so ambiguous as to admit oral proof of whose obligation it really was.

The recitals may not be in the body of the instru-

ment, but elsewhere. In a leading case in the United State Supreme Court, a check drawn on the C. Bank, signed "Wm. Paton, Jr.," had printed on its margin "Mechanics Bank," of which Paton was cashier, and it was held to be the latter bank's check. A draft headed "Office of B. Co.," signed B., President, W., Secy., and addressed to P., Treasurer, was held by that court to be the company's draft. But in New York where a note was signed "Clark, Pres., Close, Treas.," and had a marginal notation, "R. Ice Co.," the court held that the appearance on the margin of the printed name was not a fact carrying any presumption that the note was or was not intended to be one by that company.

If one accepts a draft, he is bound as acceptor even though he adds the word "agent," "president," "treasurer," or the like to his signature. This applies where the draft is drawn on him. If drawn on the principal and accepted by the agent as such, the liability is obviously doubtful. In fact, such procedure is so irregular as to make the whole acceptance questionable.

Where both the names of a corporation and of an officer or agent of it appear upon a bill or note it is often perplexing to determine whether it is in legal effect the contract of the corporation or of the individual officer or agent. Where a note is made payable to a corporation in its corporate name and is endorsed by the authorized officials of the corporation, the tendency is to hold the indorsement as that of the corporation. This holding is due to the well established rule of the Law of Negotiable Instru-

ments that no one but the payee can be the first indorser of commercial paper and thus make transfer of title thereto. In addition, extrinsic evidence is admissible to show that only in the indorser's official capacity was the indorsement made as that of the corporation.

**Liability of Agent Where Principal Is Undisclosed.**

Referring back to the allusions to undisclosed principals (as distinct from merely unnamed ones) it was noted that though not nominally a party thereto, such principals are liable on equitable grounds. But this does not excuse the agent from his legal liability. Being a party to the contract in terms, the agent is liable unless (with full knowledge of the fact) the third person elects to look to the principal after discovering his existence and identity. This right of choosing whom he will sue rests with the third person and he cannot be controlled in it by the agent. Moreover, it is a rule of evidence that parol proof is inadmissible to alter, vary or enlarge the terms of a written contract. Consequently, if one in terms enter into a written agreement naming himself as principal, he cannot, when sued, repudiate such character and successfully assert that he was merely an agent.

An agent is also liable to the third person where he has an interest in the subject matter of the transaction, as is the case with an auctioneer. He may be personally liable for refusing to accept a highest bid or for refusing to deliver goods in his possession sold by him for his disclosed principal, etc. He is not, however, liable upon an implied warranty of title.

As previously shown, the principal's death terminates the agency; so that if the agent contracts on behalf of the principal subsequent to the latter's death and in ignorance thereof, the agent is not liable as he would be for an incompetent or fictitious principal. Nor is he liable where he discloses fully the extent of his authority and then assumes to act in excess of it; nor where, by reason of insufficiency of the form in which the contract is entered into, the principal himself is not bound. Ordinarily, a public agent acting officially is not bound personally by contracts entered into with third persons, irrespective of the form or nature of such contracts.

**Other Instances of Agent's Liability.**

Where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, then it may be recovered from the agent provided he has not paid it to his principal, nor altered the situation in relation to his principal, as for instance, by giving fresh credit. The rule does not apply where there is a mere passing of credit on the agent's books, for in that case the agent still has it in his power to redress himself. But if by mistake the third person pays the agent money for the principal, or upon a consideration which fails, the agent is liable to the third person if such third person duly notifies the agent before he has paid it over to his principal or otherwise effectually changed his position as to it with his principal.

*Malfeasance of Agent.* If, however, the money has been obtained by any fraud perpetrated by the agent

he is liable even though he may have paid it over to his principal. If the agent is innocent and the principal alone is guilty of the fraud, the agent is not accountable except under the circumstances as just given in cases of mistake. Money paid by compulsion or extortion is affected the same as in fraud cases. Where an agent rightfully receives money on behalf of his principal, but wrongfully appropriates it, the third person has a right to proceed against either the principal or the agent.

*Misfeasance of Agent.* Not only in cases of malfeasance as just enumerated, but often in cases of misfeasance, an agent is liable in damages to the third person, as where an agent misrepresented that land which he was selling for his principal was clear of incumbrances, when it had a mortgage against it. In a California case, defendant was engaged in the business of buying and selling corporate stock on commission. Plaintiff's employe stole certain stock from plaintiff, represented to defendant he owned it and defendant in good faith and in ignorance that it was stolen, sold it in the regular course of business and paid the proceeds to the thief. Four judges held the commission man liable for conversion and two judges dissented. An old English case declares that "the warrant of no man, not even the king himself, can excuse the doing of an illegal act, for though the commanders are trespassers, so also are the persons who do the act."

*Non-feasance of Agent.* As to mere non-feasance, Chief Justice Gray says: "It is doubtless true that if an agent never does anything towards carrying out

his contract with his principal, but wholly omits and neglects to do so the principal is the only person who can maintain an action against him for the non-feasance; but if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly." If the agency was a gratuitous one, not even the principal can recover for mere non-feasance.

An agent, as we have already seen, is personally liable for his own fraud and conversion and his mere agency is no protection. He may be personally innocent, though his principal is not; in which case ordinarily the principal alone is answerable. Where they are both wrongdoers to the injury of the third person the latter may commonly recover jointly against both the principal and the agent.

*Liability of Agent Where Acting Independently.* Where an agent contracts in his own name in a sealed or negotiable instrument he alone is competent to maintain suit on such instrument. Where the instrument is sealed the agent's recovery is subject to any set off against the principal in favor of the third person, who is after all the real party in interest. In the case of a negotiable instrument, the agent

may, of course, easily endorse the paper to his principal, thereby making the principal a competent plaintiff.

One may contract as agent when he is in reality a principal. Circumstances control as to whether the promisee may throw off the character of agent and sue as principal. Again, it may sometimes happen that both the principal and agent are bound to the third person by the same contract. In such cases, by the doctrine of mutuality, either may sue the third person, though the primary right seems to be in the principal. In either event the defendant may set up any defense good against either, irrespective of who sues. In an Indiana case, where a joint agent sued as trustee for his joint principal, the defendant set up a release executed by such principals and this was held good.

Where the third person has been paid money by the mistake of the agent, he is liable in quasi-contract therefor; and to recover it, either the principal or agent may sue. So, also, the third person is liable to the agent as such for a few torts which he may commit against such agent; thus, where the third person injures or converts property in which the agent (such as an auctioneer or factor) has a special interest; or where his compensation depends on commissions and the third person falsely and maliciously libels such articles, thereby diminishing his sales; or where the third person unjustifiably induces a principal to discharge an agent.

## IV.

### RELATIONS BETWEEN PRINCIPAL AND AGENT.

Moving now to the relations of the principal and agent as between themselves, we find that, strictly speaking, this is not within the purview of our subject, for in the main the third person is not concerned with the relations as between the principal and agent. Still there are many instances in which the third person is indirectly concerned and to a few of these let us now direct our attention.

We have already observed that a principal and third person are mutually bound, both in contract and by common law, only when the agent is acting within his real or apparent authority, as the case may be. But suppose he is not acting within his authority and that the transaction is ineffectual. We have seen that the principal may ratify and this will have a retroactive effect. What are the results as to the agent's rights and liability in these and other unexpected situations?

#### Duties of the Agent.

If the agent acts beyond his actual authority but within his apparent authority and the principal is thereby bound to the third person, the principal may recover from the agent for the damage done. If the agent is given express directions and departs from them he is liable, for one of the duties he owes is obedience. If he is vested with discretion or delegated any management he must act with due care, for another essential duty is to exercise prudence. Doubt-

less the paramount duty of every agent is to exercise good faith. Agency is properly said to be a relation *uberrimae fidei*—of the utmost confidence. It follows somewhat the Biblical principle that a man cannot serve two masters. Applied to agency this means that a person cannot serve two principals at once when they have adverse interests.

Especially true is it that an agent cannot lawfully represent another in any transaction in which his employer has an interest, and such other includes himself as well as any third person. Instances along this line are numerous. Thus, where an agent was not only to look after and care for his principal's land, but to sell it, it was a violation of his duty to take a tax deed to himself or another.

So also where an agent undertook to purchase corporate stock for his principal and without the latter's knowledge transferred ten shares of his own stock to the principal, the latter was entitled to rescind the sale irrespective of values, as the law looks only to the constructive fraud. An agent bought a horse of a third person for $65, agreeing to divide the profits with him. At the same time he had $80 of his principal's money with which he was to buy a horse as cheaply as possible and to receive $1 for his services. The principal was held entitled to a judgment for the excess over the actual cost price ($72.50) and the fee. Where the manager of a Chicago theater took a renewed lease in his own name, he was held to be a trustee thereof for the benefit of his principal. As we have already seen, if there is any collusion between the agent and third party, both are liable.

Other duties an agent owes his principal are to keep his principal's property and money separate from his own, to keep and render proper accounts of his transactions and, as already stated, to turn over to his principal the profits derived from the business. If an agent deposits money in his own name in his own account, he is personally liable if the bank fails or the money is negligently paid out. In an interesting Vermont case, an agent sold prize packages of candies (contrary to a penal statute) and collected the price which he refused to account for on the ground of the illegality in the transaction. The Court said: "When the money was so paid by the purchasers, it became the principal's money and when it was received by the agent as such, the law, in consideration thereof, implies a promise on the agent's part to pay it over to his principal; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract." The same rule was applied in compelling a bucket-shop broker to account for profits made in dealing in "futures"; though there is some dissent as to this.

*Duty of Agent Not Dependent Upon Compensation.* So far as the third person is concerned, it makes but very little difference whether the agency relation is gratuitous, or founded on contract, for, as already indicated, the right of recovery for mere non-feasance on the agent's part is limited to the principal. He in turn may recover only when the agency is founded on contract for there is ordinarily no liability connected with the non-feasance of a gratuitous promise. But whether gratuitous or otherwise, if the

agent undertakes the performance of his promise and in so doing commits a wrong to his principal's damage he is liable to the principal.

### Duties of the Principal.

The principal owes corresponding duties to his agent, the chief one of which is probably that of compensating the agent. Ordinarily this is a matter of contract, express or implied. To secure his compensation, an agent may assert a lien on his principal's property in his possession. The liens of factors, bankers and attorneys are general; those of other agents are special. Where an agent represents both contracting parties, his right to be compensated by either of them depends on whether the principal knew that his agent was also acting for the other person. If both knew he was acting for the other he may recover from both.

In a very recent Indiana case a real estate broker whose sole function was admittedly to bring the purchaser and seller together was held entitled to recover a commission from both. But if neither knew (actually or impliedly) that he was acting for the other, he is entitled to compensation from neither.

A leading Pennsylvania case compelled an agent to restore a $5,000 commission which he had already been paid under these circumstances. If one of them knew and the other did not, he is not entitled to any pay from the one not aware of the duplicity, and there is some authority to the effect that neither is liable.

If an agent pays out or becomes individually and

solely liable for any sums to a third person in the due course of the agency and for the principal's benefit, he is entitled to reimbursement provided they were reasonable in amount and necessary. He may also receive indemnity against the consequences of all acts duly performed without neglect or illegality. When, as previously stated, a third person recovers against an auctioneer for selling as his principal's property goods belonging to such third person, the auctioneer may hold the principal to indemnify him provided the sale was innocently made and not carelessly.

This Lecture has not attempted to be an exhaustive treatment of the subject of Agency. A number of situations of every-day occurrence have been discussed with the belief that the principles of this branch of the law will thereby be better fixed in mind.

Since one may do by an agent practically anything which he might do by himself, it follows that this branch of the law is intimately connected with practically every other field of the law. The cases discussed probably have helped to emphasize this fact. And no doubt you now have a better realization of how vitally the law of agency affects business.

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